Ruehle's Paramedic Ambulance, Inc. *and* Joseph Old. Case 7-CA-20650

22 June 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 30 August 1983 Administrative Law Judge Thomas R. Wilks issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set out in full below and orders that the Respondent, Ruehle's Paramedic Ambulance, Inc., Mt. Clemens, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Cease and desist from

(a) Interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act by suspending and/or laying them off for engaging in activities on behalf of United E.M.T.'s or any other union or because they have given testimony under the Act.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Offer Joseph Old reinstatement to his former job, or to a substantially equivalent job, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any loss of pay he may have suffered as a result of the 11 February 1982 suspension and layoff computed in the manner set forth in the section of the judge's decision entitled "The Remedy."

(b) Expunge from its files any reference to the suspension and layoff of Joseph Old and notify him in writing that this has been done and that evidence of these unlawful actions will not be used as a basis for future personnel actions against him.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Mt. Clemens, Michigan facility copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[1] In view of our findings that the Respondent violated Sec. 8(a)(4), (3), and (1) of the Act by suspending and laying off Joseph Old in retaliation for his union activities and his participation in an unfair labor practice proceeding, we find it unnecessary to reach the question of whether Old's conduct on 8 February 1982 was protected concerted activity and served as an additional unlawful basis for the Respondent's action against him. Accordingly, we do not adopt the judge's analysis on this issue. Further, we find it unnecessary to pass on the judge's finding that the allegation in par. 8 of the General Counsel's complaint as to the concerted nature of Old's 8 February conduct must be deemed to be admitted because of the nature of the Respondent's answer to that paragraph. The remedy is not affected by this action. However, the Order and notice are modified in accordance with our findings.

In its brief in support of exceptions the Respondent suggests that the judge's determination of the issues in this case indicate a bias in favor of the General Counsel. Upon careful review of the record in this proceeding we find no support for the Respondent's allegation.

[2] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[3] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed by Section 7 of the Act, by discharging them for engaging in activities on behalf of United E.M.T.'s or any other union, or because they give testimony under the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Joseph Old reinstatement to his former or substantially equivalent job, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any loss of pay he may have suffered as a result of the discrimination of 11 February 1982, plus interest.

WE WILL expunge from our files any reference to the suspension and layoff of Joseph Old on 11 February 1982, and WE WILL notify him that this has been done and that evidence of these unlawful actions will not be used as a basis for future personnel actions against him.

RUEHLE'S PARAMEDIC AMBULANCE, INC.

DECISION

STATEMENT OF THE CASE

THOMAS R. WILKS, Administrative Law Judge. The trial of this matter was held before me on March 14–15, 1983, at Detroit, Michigan, pursuant to an unfair labor practice charge filed on May 11, 1982, by Joseph Old, an individual, against Ruehle's Paramedic Ambulance, Inc. (Respondent) and a complaint issued by the Regional Director for Region 7 on June 30, 1982. The complaint alleges that Respondent suspended and laid off employee Joseph Old because of his union and other concerted activities protected by the Act and because he had given testimony in an unfair labor practice hearing, and thus violated Section 8(a)(1), (3), and (4) of the Act.

Respondent filed an answer which denied the commission of unfair labor practices. Respondent argued orally at the hearing, and the General Counsel filed a written brief after the close of the hearing.

On the entire record, and on my observation of the witnesses' demeanor, and after careful consideration of the brief and oral argument, I make the following

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

Respondent is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of Michigan and has maintained its principal office and place of business at 191 N. Gratiot in the city of Mt. Clemens and State of Michigan, herein called Respondent's main station. Respondent maintains another station located in Clinton Township, Michigan. Respondent is, and has been at all times material herein, engaged in providing emergency medical transportation and services to individuals, hospitals, and businesses. During the year ending December 31, 1981, which period is representative of its operations during all times material herein, Respondent, in the course and conduct of its business operations, performed services valued in excess of $400,000, of which in excess of $50,000 was received from Medicare and Medicaid, agencies of the United States Government, as payment for services provided to clients of said agencies.

It is admitted, and I find, that Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The United E.M.T.'s (the Union) is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICE

A. *The Issues*

The General Counsel alleges that Joseph Old was suspended and laid off because of his activities on behalf of the Union, because of his testimony in a previous unfair labor practice proceeding, and because he and his ambulance team partner Dave Barrios, as described in paragraph 8 of the complaint, "concertedly questioned and protested a job assignment given to them by the dispatcher" on February 8, 1982.

Respondent contends that Old was suspended for 1 week because of misconduct engaged in on February 8 consisting of a job assignment disputation, and that he was laid off at the end of that week because economic circumstances dictated that certain employees be laid off and Old was selected to be among that group because of his past disciplinary record. Respondent in its answer neither admitted nor denied paragraph 8 of the complaint, nor amended its answer thereafter. Paragraph 8 must therefore be deemed admitted pursuant to Section 102.20 of the Board's Rules and Regulations.[1] At the hearing Respondent argued that Old is not entitled to the protection of the Act because he engaged in a concerted work stoppage without having complied with Section 8(g) of the Act respecting concerted work stoppages at a health care institution. Moreover, Respondent also argued that Old's conduct of February 8, 1982, was not

[1] See also *Walnut Creek Hospital*, 208 NLRB 656 (1974).

concerted but constituted individual activity. It did not amend its answer.

B. *Facts*

1. Background

Respondent, prior to January 1982,[2] operated at three locations adjacent to the outer suburbs of the Detroit, Michigan metropolitan area at which places it provided ambulance services which involved the transportation of sick and injured persons to health care facilities. Some of these services entailed life-threatening emergencies, and others involved transfer or "shuffle" runs where patients were transferred from one facility to another on a nonemergency basis. From the main station, Respondent, by a dispatcher, assigned runs to full-time ambulance teams, each of which worked three 24-hour shifts per week on an alternating basis of 24 hours on duty and 24 hours off duty. The dispatcher is in communication with the clients and ambublance teams by telephone and by radio communication. Those drivers assigned to the main station are accessible directly by the dispatcher as they are located in a rest area in close proximity to the dispatch office. The dispatcher decides which team is to be assigned each run.

The ambulance teams consist usually of two EMTs (i.e., emergency medical technicians). One of these is a "basic E.M.T." of limited skills and experience. The other is a more advanced EMT whose status is determined by the level of skills possessed, education, and certification by state authority. There are two levels of advanced EMTs, i.e., "specialist" and the highest level, i.e., advanced EMT (or paramedic). Old occupied the position of the highest advanced EMT. Respondent's teams consisted of about 25 employees at its peak level.

In late May 1981, Respondent commenced the operation of its third station, i.e., Roseville, pursuant to a contract with the city of Roseville, Michigan. After 3 months of operation, Respondent lost its contract with that city, and thereafter engaged in litigation with that municipality concerning the loss of the contract. Respondent had acquired a building and equipment to operate the Roseville station. A limited crew was retained at Roseville despite the loss of work previously provided by the city. In November 1981, Respondent decided to retain only one ambulance at Roseville instead of two, and it laid off three EMTs. In January 1982, the Roseville station was closed, and the remaining EMTs transferred to the main station.

Old was hired in October 1979, long before any hiring necessitated by the Roseville contract. He participated in organizational activities on behalf of the Union from July 1980 until October 6, 1980, when it was certified by the Board as exclusive collective-bargaining agent. Old was elected the union president and participated as chief spokesman in 12–14 collective-bargaining negotiations on behalf of the Union with Respondent's representatives, General Manager Ray Ruehle and Attorney Thomas Oehmke. These negotiations occurred over a period of time from about November 1980 through April 1981. No contract was executed. Between January 1981 and April 1981, the Union filed three separate unfair labor practice charges against Respondent which culminated in the issuance of a consolidated complaint in Cases 7-CA-28729 and 7-CA-19211 against Respondent involving allegations of bad-faith bargaining. Pursuant to the complaint, a trial was held before Administrative Law Judge James Rose on February 10 and 11, 1982. Although several employees were called to testify at that trial, it is stipulated that Old was the primary witness on behalf of the Union.

On February 10, Old was not scheduled to work. On February 11, Old was scheduled to work but pursuant to explict approval of Ray Ruehle he remained at the hearing until it closed. Old arrived at this station about 1 p.m. but found that his assigned ambulance was on dispatch. Shortly thereafter, he received a message to visit Ray Ruehle. There was no advance explanation for the summons. When Old complied he was informed by the presentation of a memorandum from Ruehle that he was suspended for 1 week because of alleged misconduct engaged in on February 8 involving an argument with the dispatcher concerning an assignment and informed that he was indefinitely laid off thereafter. It is Old's credible and uncontradicted testimony that the following conversation occurred. Old asked Ruehle whether he wanted to hear Old's version of the February 8 incident but Ruehle stated that he saw no reason to do so. Old accussed Ruehle of retaliating against Old because of his participation in the unfair labor practice litigation. In response Ruehle merely shrugged and gave Old the option of resigning with 2 week's pay or of being laid off. Old took the suspension notice and departed.

2. The February 8 incident

Ray Ruehle testified that he made the decision to suspend Old on a receipt of dispatcher Colleen Chastain's report. That receipt occurred on the evening of February 8. Ruehle further testified that prior to the February 10–11 trial he had decided to lay off additional employees because of the loss of the Roseville business and that Old was already under consideration as a candidate for layoff based on his past disciplinary record and that, on awareness of the February 8 incident, his decision "was [made] conclusive after the conversation with Collen Chastain." Ruehle testified that his attorney advised him to avoid effectuating that decision until the resolution of the then outstanding charge, but he testified that economics demanded action but he at least waited until after the hearing closed. Clearly, Old was given no advance warning.

Ruehle testified that his only information of the February 8 incident came from Colleen's report. Colleen testified on behalf of Respondent.[3] According to her, she presented Ruehle with a written report of the alleged misconduct on the evening of February 8, and only informed Ruehle orally that what had transpired was contained in that report. Thus, he heard no other information other than that report which states:

[2] All dates herein are 1982 unless otherwise stated.

[3] She testified as a witness called by the General Counsel at the February 10–11 trial.

4:28 p.m.
2-8-82 Called Station 2
Advised Dave B that he and Joe were up for 4 runs (Back & forth from Dalcoma). He was advised they had one run all day & they were up. The run was dispatched and received accordingly. Within one minute Dave B called back asking why they had to take these calls. I advised him that I was the dispatcher and they were up in my opinion. The message was relayed to Joe. Joe then got on the phone yelling at me that they were not up for the calls. That it was after 4:00 and South end does not do Dalcoma after 4:00 pm per the main boss! I explained again, the situation and told him that was per Ray. After a pause he said "Is that right?" I said yes that he was up and dispatched and the card was punched. He said he didn't give a f—! and I hung up.

[S] CC

NOTE: He also felt since he only had one run they shouldn't be up for the next 4 runs.

In fact Old did not refuse an assignment and Ruehle testified that it was his impression from reading the report that Old did not refuse to take the run. From the record I conclude that the amount of time expended by Old in questioning and protesting the assignment caused no more than a 2- or 3-minute delay. The runs, i.e., double runs to and from hospitals and an x-ray clinic (Delcoma), were of a nonemergency nature. There is no evidence that the delay caused any degree of inconvenience.

The notice of suspension tendered to Old by Ruehle on February 11 states:

> On Monday Feb. 8. 1982, at approx. 4:28 P.M. You were given a number of west to Dalcoma calls by the dispatcher on duty.
>
> Rather than take the calls as requested, you engaged in arguement [sic] with the dispatcher regarding the calls & used profane & abusive language during the conversation.
>
> You will be given one week suspension without pay starting at 3:30 P.M. Feb 11, 1982 and ending Feb 18 at 8:00 A.M.

Ruehle testified that he considered Old's February 8 job assignment protest to be an individual action and not concerted. However, the only evidence he had of what occurred was Chastain's report. Despite the testimony of Old's February 8 partner, Joseph Barrios, which tends to suggest, by way of hesitant, uncertain demeanor, that Barrios did not wholeheartedly support Old's protest, the Chastain report clearly indicates concerted activity, i.e., Barrios initiated the inquiry as to why "they had to take" the multiple assignment rather than another team.[4]

Chastain testified as to the events of February 8 and embellished greatly on the report she actually composed immediately after the event had been submitted to Ruehle. These embellishments were not, however, conveyed to Ruehle and could not have served as a basis for his decision.

According to Chastain, she decided to give Old's team a multiple run because prior to 4 p.m. he had received only one other run from the 8 a.m. start of his shift and she had decided to apportion the work more evenly.[5] Old had been available for runs from 8 a.m. with the exception of a 15-minute duration from 10 a.m. wherein, with Ruehle's permission, he participated in a pretrial telephone conference call with the General Counsel, Respondent, and Judge Rose. Old testified credibly and without contradiction that he had never been assigned multiple runs in the past. He testified that he thought Chastain was acting unfairly. Chastain testified that when she decided to assign multiple runs to Old and Barrios, who were located at station 2, 6 miles away from the destination, several available EMTs were present with her at the main station which was physically closer by 3 miles to the destination but, because of the layout of the road pattern, about the same distance in route miles. She testified that she told them of her intention to telephone Old and to inform him of the multiple assignment and stated aloud, "I'll give 60 seconds for Joe to call back." When pressed in examination for an explanation for this remark, which on its face suggests something provocative of the nature of the assignment, she testified nervously and guardedly that it was "not unusual" for Old to call back and argue about a run. She was unable to testify with any detail as to the frequency of these arguments and variously testified that it was not "very often," but "moderately to often," and "not uncommon."

According to Chastain, Barrios received the first call, but it was he who called back and, despite her assertion that the dispatcher's assignments are to be accepted, it was Barrios who insisted that she give assurance that they were "up" for those runs and/or insisted on an explanation for the runs. She authoritatively reminded him of her discretion as dispatcher and at that point Old took the telephone.[6] According to Chastain, Old yelled and screamed, "Why are we up for these [expletive deleted] calls," and "this is [expletive deleted] not fair," and insisted that they were not up, and that further, his station, the south station, is not, according to Respondent's policy, to be assigned that type of run after 4 p.m. According to Chastain, after she responded that she did not know who informed him of such policy but that she had been informed to use her own discretion in the utilization of the south station (i.e., station 2.) To that, she testified that Old responded with an obscene expletive and he hung up. However, in subsequent testimony, she asked

[4] Barrios admitted in his testimony that the nature of the assignment was a matter of concern to him and that he would rather have not taken it and that he was disappointed in receiving it and that he informed Old of the assignment in a sarcastic manner so as to let Old know his feelings. After he called Chastain the second time to question her basis for the selection of their team, Barrios threw the telephone at Old saying, "[Y]ou tell her."

[5] On that date 5 teams received the following number of runs: team 4—10 runs; team #6—1 run; team #9—5 or 6 runs; team #7—7 runs; and team #10 (Old-Barrios)—7 runs.

[6] Barrios testified that he threw it at Old because Barrios did not wish to pursue the argument.

him directly during the conversation whether he was refusing the runs, he stated that he was not refusing to accept the runs. In fact she ended the conversation by informing him in effect that he had received his assignment and that there was to be no further conversation, and she hung up. He then called back and stated that he and Barrios were en route to the destination.

Old's recollection was vague as to the use of obscenities but he conceded that he probably used such language when he insisted on an explanation for the assignment.

Ruehle testified that Old was not suspended because he refused a run but rather because, contrary to Respondent's policy as told to all EMTs, Old disputed an assignment with the dispatcher (who works under great stress) before taking a call, rather than waiting until after the run to protest. Moreover, he testified, Old used abusive language to the dispatcher. The evidence in the record does not support this testimony. It is undisputed that EMTs commonly protest and/or question assignments, particularly on being awakened by the dispatcher, and that EMTs commonly complain of the type of runs assigned to Old on February 8, i.e., shuffle runs.[7] Indeed, Chastain testified that it was not uncommon for Old and others to protest upon notification of assignment. Despite this testimony, she stated that it was not Old's foul language that upset her on February 8, but rather Old's challenge to her authority. She did not explain why, then, she was more upset on February 8, that at any time in the past inasmuch as Old had never received a prior warning about disputing the dispatcher's assignments. Furthermore, EMTs who had engaged in more severe misconduct were treated far less harshly than Old. Thus EMTs who had actually refused a run outright received either a 1-day suspension or mere warnings.

With respect to the use of profanity, the evidence reveals that the type of language used by Old toward Chastain on February 8, was commonly used by most of Respondent's employees, and utilized subsequently by Chastain herself toward a Respondent manager, Danny Chastain.[8] In that confrontation Chastain became enraged when Manager Chastain refused to volunteer to take a run. Her conduct included not merely vituperative obscene language but also included the hurling of physical objects about the dispatch room according to a memorialization of that event by Manager Chastain dated March 22, 1982. Colleen Chastain was not disciplined about the event, nor was she aware that it had been memorialized in her personnel file.

Repsondent, however, has warned employees about abusive language but no context was adduced for these situations. No employee was terminated or suspended for such conduct but merely "warned." Old was never given a written reprimand concerning use of abusive language. One incident did occur in October 1981 where during the course of a conversation Manager Danny Chastain told him to stop using obscene language. A memorandum in Old's personnel file indicates that a memorialization was made by Danny Chastain of a purported confrontation between himself and Old who, in the capacity of union representative, was protesting an alleged discriminatory layoff of a unit employee. Although that report reflects the use of vulgarity and profanity by Old, the thrust of the document is not a complaint about profanity but rather a report to Ray Ruehle of Old's protest and how Chastain attempted to convey the message to the union president that the employee in question was not discriminated against but was economically laid off. There is no evidence that Old was formally reprimanded or "warned" about the use of foul lanaguge on that occasion.

3. The layoffs

Ray Ruehle testified that the loss of the Roseville contract necessitated an economic layoff. His testimony as to the economic necessity was generalized, conclusionary, and unsupported by documentation. It is undisputed, however, that the Roseville station was closed down. Ruehle testified, also in conclusionary and generalized terms, that Respondent followed the layoff policy as set forth in a proposed clause to a collective-bargaining agreement that never came to fruition. That clause set forth that the determination of a candidate for layoff will be based on a multiplicity of factors, including seniority, past job performance, experience, skills, fitness, ability, disciplinary and attendance records, educational advancement in the EMT field, and the ability of remaining employees to properly perform the available work. that policy, however, also sets forth that "Employees shall be recalled in the reverse order in which they were laid off, provided the recalled employee is able to perform the available work." The first round of layoffs occurred in November. Three employees were laid off. On February 11, four more unit employees, including Old, were laid off. Finally, in March, two secretaries were laid off because of a reduction in "paper work" due to the loss of Roseville, and Ruehle accepted a voluntary layoff.

Prior to the Roseville operation, Respondent maintained about 17 employees. With the Roseville operation it rose to 24 or 25. Ruehle testified that the number of runs after the loss of the Roseville contract was at the same level as before that contract. However, Ruehle admitted that subsequent to the Roseville closure Respondent has purchased five new ambulances and related equipment. Moreover, Respondent actually hired new EMTs subsequent to Old's layoff and reinstated one of the February laid-off employees. These admissions remain in the record unexplained. The economic justification for the layoff of Old and his nonrecall is therefore based on inconclusive evidence of a dubious probative value.[9] However, Respondent's evidence that these layoffs did occur and that there was a loss of $300,000 per annum attributed to the Roseville closing is not rebutted.

With respect to the first round of layoffs, Ruehle selected EMTs Dziuber and Koskinnen because they had

[7] Old's testimony of the unusual nature of a multiple shuffle run is unrebutted.

[8] He is the brother of her former husband.

[9] I found Ray Ruehle to be a less than convincing witness who was given to inconsistencies, evasions, generalities, and whose demeanor revealed a lack of spontaneity and certitude.

only been employed 4 months. A third EMT was selected, according to Ruehle, because of his inability to work under the stress of the job which, in turn, caused poor job performance and an "attitude problem" toward Respondent and the public which resulted in numerous reprimands. With respect to the second round of layoffs, Ruehle testified that employee M.W. was selected because, although he was an advanced EMT, his own lack of confidence in his own abilities and reports of other employees' lack of confidence in him created problems. He further testified that employee C.S., a basic EMT of limited abilities, was selected because other employees questioned her ability and refused to work with her. Inexplicably, Respondent subsequently reinstated her. Employee S. was selected because a severe medical problem prevented him from performing his EMT duties effectively.

Ruehle testified that Old was selected for the layoff of February 11 because of his "past performance." By this, he explained that he meant "his disciplinary record, his attendance record, the continuous problem that management had with him with respect to taking runs, the argumentative nature of his personality." Although Ruehle testified that the February 8 incident was "conclusive" of Old's selection for layoff, he elsewhere in testimony denied that it was a "major" factor. He characterized it as a "final factor." and admitted it to be a "last straw" and "significant factor,"

No evidence was adduced that Old's performance of his duties was unsatisfactory or that he failed to meet the skills of an advanced EMT. It is admitted that other EMTs of lesser seniority were retained. Some evidence of Old's tardiness was adduced, but in the absence of comparative evidence of other employees' punctuality it is meaningless. It is admitted that other employees had worse attendance and punctuality records for which they were reprimanded more than once and in a progressive fashion and that Old was never reprimanded nor for formally warned about his tardiness. I have already noted Respondent's past tolerance of Old's tendency to complain and to question assignments, as well as its tolerance level of other employees' similar complaints.

With respect to Old's actual disciplinary record, the October confrontation memorialized by Danny Chastain does not on its face appear to constitute a reprimand. Old was, however, formally and clearly disciplined on one occasion. On October 26, 1981, he was given a 3-day disciplinary layoff because he, as union president, was held responsible by Ray Ruehle for allegedly conducting a union meeting during working hours, at which he and some union employees left their work stations to assemble at one station, and that he allegedly failed to persuade employees not to leave their assigned stations, and that the meeting was called in breach of an agreement whereby Ruehle was to be given advance notification for the purpose of business accomodation. Ruehle testified that he based his conclusions on the reports of unidentified persons. Old testified credibly, without contradiction, that he told employees not to leave their assigned station but rather to participate by telephone. He did not deny that he breached an agreement with Ruehle to discuss in advance timing of a meeting during working hours, but it is not clear that he would have been reprimanded had some employees not left their stations. Thus Old was held liable for the conduct of other employees by virtue of his union position.

No evidence was adduced as to the comparative level of Old's "disciplinary record" with that of other employees. The record, as already noted, reveals that other employees at least received more formal discipline with respect to such areas as attendance, actual refusal to accept runs, and foul language. The record therefore fails to reveal that Old's "disciplinary record" was so much worse than other employes so as to justify his inclusion with clearly incompetent employees in a limited layoff. Rather, it indicates that in many areas he had a better record, even assuming that the business of the unauthorized union meeting constituted misconduct.

C. *Analysis*

As Respondent perceived Old in its closing argument, he was "just a complainer . . . a bitcher and a bellyacher." Whatever the extent of his "argumentative nature," the record evidence reveals that he stood out no more than any other employee on February 11 from the standpoint of discipline, foul language, attendance, disputations with dispatcher, except for three factors: his union activity, including presidency and contract negotiations; his patently concerted activity of February in questioning the basis for a decision affecting a condition of employment; and his testimony at a Board proceeding. With respect to the February incident, it concerned an inquiry and protest of a matter of employment of concern to both Barrios and Old. Clearly the assignment was not onerous, but the issue of concern to Old was the justification, i.e., rationalization for the assignment, not its difficulty. Barrios' conduct clearly implied his consent to the decision to question and protest the assignment. His conduct, unknown to Respondent, in throwing the telephone at Old is not a clear retraction of that comment, but rather indicates on its face, at most, his displeasure at being the one who was voicing the objection and bearing the brunt of Chastain's reminders of her authority. Whatever his private thoughts, Barrios' overt actions to both Old and Respondent were indicative of consent and, at the very least, not indicative of a withdrawal of consent. Where an individual employee seeks an objective of concern to other employees, this consent may be implied.[10] I find that the concerted activty of February 8 did not violate any consistently enforced policy of Respondent. There was no concerted refusal to perform work and thus no work stoppage. At most, 2 or 3 minutes were consumed in the questioning and protest. A brief intrusion into worktime by employees engaged in protected activities does not forfeit the protected nature of such activity, particularly in the absence of evidence of the extent, if any, of the impairment of Respondent's operations, and furthermore such brief intrusion is not equivalent to a strike when the purpose is largely infor-

[10] *Alleluia Cushion Co.*, 221 NLRB 97 (1975); *Air Survey Corp.*, 229 NLRB 1064 (1977), enf. denied where there was no evidence of employer awareness of the concerted nature of the protected activity.

mational, as it was herein. *Empire Steel Mfg. Co.*, 234 NLRB 530, 532 (1981). A final question arises as to whether Old's use of obscene language was so egregious as to forfeit the protection of the Act. With respect to protected activities, the Board held:

> [O]ffensive, vulgar, defamatory or opprobious remarks uttered during the course of protected activities will not remove activities from the Act's protection unless they are so flagrant, violent or extreme as to render the individual unfit for further service.[11]

The use of obscene and foul language by Old constituted nothing more than vulgarity commonly expressed in his work environment and of the type to which the dispatcher was commonly exposed and utilized herself. Clearly, the objection of the dispatcher was to the challenge to her rationale for the assignment and not to the vulgarity utilized. In this context, I find that Old's vulgar language did not constitute that type of misconduct to have forfeited the protected nature of the activity.

I conclude that all the factors that distinguished Old's work record from all other employees consisted of concerted protected activities. The suspension and layoff of Old occurred in rapid sequence after the concerted activity of February 8 and his testimony at a Board proceeding and in the absence of definitive evidence for the precise timing of economic need.

Respondent's proffered reasons for the suspension and the inclusion in the layoff have been demonstrated to be false and pretextuous. The degree of punishment accorded to Old has been established to be disparate and contrary to Respondent's past practice. From the sequence of events, it must be inferred that Respondent was motivated because of a hostility toward Old's protected activities.

As stated in *Shattuck Denn Mining Co. v. NLRB*, 362 F.2d 266, 470 (9th Cir. 1966):

> Actual motive, a state of mind, being the question, it is seldom that direct evidence will be available that it is not also self-serving. In such cases, the self-serving declaration is not conclusive; the trier of fact may infer motive from the total circumstances proved. Otherwise no person accused of unlawful motive who took the stand and testified to a lawful motive could be brought to book. Nor is the trier of fact—here the trial examiner—required to be any naif than is a judge. If he finds that the stated motive for a discharge is false, he certainly can infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal—an unlawful motive—at least where, as in this case, the surrounding facts tend to reinforce that inference.

The Board stated in the *Wright Line* case:[12]

> [W]e shall henceforth employ the following causation test in all cases alleging violation of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

Very recently the Supreme Court was presented with the question of "whether the burden placed on the employer in *Wright Line* is consistent with Sec. 8(a)(1) and 8(a)(3) as with Sec. 10(c) of the [Act] which provides that the Board must prove an unlawful labor practice by a 'preponderance of the evidence'" [citation of Sec. 10(c) omitted.][13]

The Court answered that question affirmatively and thus approved of the *Wright Line* test of proof. The Court concluded that in the application of that test in the case before it that the Board's finding of violation "was supported by substantial evidence on the record considered as a whole."

In the instant case, I conclude that the General Counsel has adduced a preponderance of evidence to necessitate an inference that Old was suspended and terminated solely because of activities protected by the Act and that the proffered reasons were false and pretextuous. At the very least, I find that the General Counsel has adduced overwhelming evidence that the protected activities were a motivating if not sole factor, and I further find that Respondent has not sustained the burden of demonstrating that the same actions would have taken place even in the absence of the protected activity. Accordingly, I find that Respondent violated Section 8(a)(1), (3), and (4) of the Act as alleged in the complaint.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1), (3), and (4) of the Act by suspending and laying off Joseph Old on February 11, 1982, because of his union and concerted activities for the purpose of collective bargaining or other mutual aid or protection, and because he testified at the unfair labor practice hearing before the Board in Cases 7-CA-28729 and 7-CA-19211.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of

[11] *Dreis & Krump Mfg. Inc.*, 221 NLRB 309, 315 (1975), enfd. 544 F.2d 320 (7th Cir. 1976).

[12] *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 622 F.2d 887 (1st Cir. 1981); cert. denied 455 U.S. 989 (1982).

[13] *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

the Act. Having found that Respondent unlawfully suspended and laid off Joseph Old, I shall recommend that Respondent be ordered to offer him reinstatement to his former or substantially equivalent job, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any loss of earnings that he may have suffered thereby with interest thereon to be computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977).[14] I shall also recommend that the Respondent expunge from its records any reference to the unlawful suspension and layoff on February 11, 1982, and notify him in writing that this has been done and that evidence of these unlawful actions will not be used as a basis for future personnel actions against him.

[Recommended Order omitted from publication.]

[14] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).